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No. 01-0215

Supreme Court, U.S.
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In The

# Supreme Court of the United States

MARION DIXON, *ET AL;*

*Petitioners,*

v.

FORD MOTOR CREDIT, *ET AL;*

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION FILED BY RESPONDENTS AMERICAN NATIONAL INSURANCE COMPANY, CHRYSLER FINANCIAL CORPORATION, AND NISSAN MOTOR ACCEPTANCE CORPORATION

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## QUESTIONS PRESENTED

I. Whether there is any circuit conflict that civil RICO plaintiffs must plead and prove detrimental reliance upon the alleged mail or wire fraud in order to establish proximate causation between the purported RICO violation and their injuries.

II. Whether other issues presented by Petitioners are properly before the Court, given Petitioners' failure to raise them below and their irrelevance to the decisions of the courts below.

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The Petitioners have listed all parties in this proceeding. The Respondents provide their Rule 29.6 corporate disclosure statement below.

American National Insurance Company ("ANICO") is a publicly traded corporation. There is no parent company or publicly held company owning ten percent (10%) or more of ANICO's stock. Two charitable trusts, the Libbie Shearn Moody Trust and the Moody Foundation, each own more than ten percent (10%) of ANICO's stock.

Chrysler Financial Corporation, now known as Chrysler Financial Company, L.L.C., is a wholly owned subsidiary of DaimlerChrysler Corporation, which is a wholly owned subsidiary of DaimlerChrysler North America Holding Corporation, which is a wholly owned subsidiary of DaimlerChrysler AG. Of these entities, only DaimlerChrysler AG is a publicly held company.

Nissan Motor Acceptance Corporation is a wholly owned subsidiary of Nissan North America, Inc., which is a wholly owned subsidiary of Nissan Motor Co., Ltd. Renault, S.A. owns 36.8% of the common shares of Nissan Motor Co., Ltd., and is a publicly traded corporation.

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## COUNTERSTATEMENT OF THE CASE

The two consolidated cases at issue here – *Dixon* and *Wells* – are putative class actions filed by Petitioners on behalf of purchasers of credit life insurance bought in connection with automobile purchases. The suits are directed against credit life insurers, finance companies who purchased the Petitioners' retail installment contracts, and an automobile dealer. Petitioners allege they were misled during negotiations with the automobile dealers and that they sustained damages due to their subsequent payment of supposedly excessive insurance premiums and interest. Defendants are cast as co-conspirators in various alleged "enterprises" engaged in mail and wire fraud, all purportedly in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq. ("RICO"), and the Louisiana Motor Vehicle Sales Finance Act, prior La. R.S. 6:951, et seq., and present La. R.S. 6:969.1, et seq. (the "LMVSFA").

On July 19, 2000, the district court held a hearing in the consolidated cases to address a Motion to Disqualify Dawn Adams Wheelahan as Class Counsel and for Sanctions. App. at 19. During the hearing, the district court questioned whether Petitioners stated a viable RICO claim – the only federal claim before the court – and ordered briefs on that jurisdictional issue. *Id.* The briefs submitted included deposition testimony from the Petitioners.

The district court then applied the Fifth Circuit's decision in *Summit v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 896 (2001), and on September 11, 2000, dismissed the RICO

claims with prejudice, due to Petitioners' inability to state RICO claims as a matter of law. App. at 31, 34-35. The district court dismissed the LMVSFA claims, without prejudice, after finding that the exercise of supplemental jurisdiction over those state law claims was inappropriate. App. at 32-34. The Fifth Circuit affirmed. App. at 11.

This is a garden variety state law dispute that Petitioners seek to transform into a federal racketeering case. Congress surely did not intend such an expansion of federal jurisdiction when it enacted RICO. With the dismissal of the RICO claims, issues of Louisiana law may properly be resolved by Louisiana state courts. The Fifth Circuit prudently declined to "federalize" state law in this fashion. So should this Court.

The question presented for review is a narrow one. Petitioners seek review of an order issued by the District Court for the Eastern District of Louisiana, affirmed by the Fifth Circuit, in which the trial court held that Petitioners failed to state a claim under RICO:

> In sum, under *Holmes* and *Zervas*, a plaintiff must show proximate cause to recover under RICO on a claim predicated on mail fraud. To show proximate cause in such a case, plaintiffs must demonstrate reliance on defendants' mail fraud. Plaintiffs herein have conceded they did not rely on defendants' mail fraud, and in fact, did not rely on any representations or omissions made by defendants in purchasing credit life insurance. Accordingly, plaintiffs cannot state a claim under 18 U.S.C. § 1962(c).

App. at 31 (citations omitted). Therefore, the only question for this Court to review is whether there is a conflict between the circuits based on the Fifth Circuit's requirement that these Petitioners plead and prove detrimental reliance upon the alleged mail or wire fraud in order to establish proximate causation between the alleged RICO violation and their RICO injuries. The standard for testing a plaintiff's prudence in a scheme to defraud is not an issue before the Court on this Petition.

Petitioners inaccurately characterize the holdings of the various circuit courts when they assert that civil RICO plaintiffs, in a claim based upon the predicate acts of mail and/or wire fraud, need not plead and prove that they detrimentally relied upon the alleged mail or wire fraud. Petition at 6. Because there is no conflict among the circuits on this issue, Petitioners' suggestion that this Petition presents the Court with a conflict among the circuits is erroneous.

Petitioners' analysis of the LMVSFA is misplaced, as: (1) neither the district court nor the Fifth Circuit ruled on the merits of Petitioners' LMVSFA claims; and (2) Petitioners have sought only review of the dismissal of their RICO claims. Accordingly, Petitioners' statements regarding the LMVSFA should be ignored. The bulk of Petitioners' remaining assertions are relevant only to the merits of this case and thus require no response, for the merits were not addressed in the courts below.

## STATEMENT OF FACTS

Each of the Petitioner-purchasers asserts that at the time he purchased his vehicle from the automobile dealer, he also purchased credit life insurance from the same dealer who made the credit installment sale of the vehicle. The purchases of the credit life insurance and the vehicles were financed by the defendant finance companies, who purchased retail installment contracts previously entered into between the purchasers and the dealers. The following chart shows the relationship of the Petitioners and the Defendants:

| Petitioner | Financing By | Credit Life Provided By |
|---|---|---|
| Leroy Perry | Ford Credit[1] | ANICO[2] |
| Kevin Duthu | NMAC[3] | FALA[4] |
| Michelle James Orso | CFC[5] | FALA |
| Kevin Wells | n/a[6] | LDS[7] and FALA |

The Petitioner-purchasers claim that at the time of their financed purchases, they were fraudulently induced by the automobile dealers to buy credit life insurance in

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[1] Ford Motor Credit Company

[2] American National Insurance Company

[3] Nissan Motor Acceptance Company

[4] First Assurance Life of America

[5] Chrysler Financial Corporation

[6] Wells, the named plaintiff in the consolidated matter, C.A. No. 99-CV-1819-J, did not sue the creditor who financed his purchases from Crescent City Nissan East.

[7] Louisiana Dealer Services, Inc.

coverage amounts which were excessive. Although Petitioner-purchasers do not dispute that the full premium for the credit life insurance was disclosed to them prior to their purchases, they contend that they were not told that a portion of the premium would be paid by the insurers to the vehicle dealers as commissions. NMAC, Ford Credit, and CFC are alleged to have participated in the acts of the vehicle dealers who sold credit life insurance to Petitioners on behalf of ANICO and LDS/FALA by providing financing and the forms for retail installment contracts and by subsequently accepting Petitioners' monthly installment payments by mail. Petitioners contend that under these alleged facts the Defendants are liable to Petitioners for unquantified damages equal to the amounts paid by Petitioners for purportedly excessive insurance premiums and interest. The alleged basis of the Defendants' liability is RICO § 1962(c) and state law claims under the LMVSFA.

In their statement of the case, Petitioners make a host of irrelevant factual allegations that are unsupported by the record.[8] Even assuming, for purposes of Fed.R.Civ.P. 12, that the allegations in the various complaints must be taken as true at this point in the proceeding, not a single

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[8] Petitioners' factual allegations relate to the merits of this case, which are not before the Court on the Petition for Certiorari. Respondents do not waive their objections to Petitioners' misstatements of the case (*e.g.*, Petitioners' characterizations of the nature of credit life insurance, the scope and description of the insured risk, the nature of the credit life policies, the adequacy of disclosures, the descriptions of the insurance terms and risks covered, the existence of any omissions, and the complexity of the documents).

allegation or any combination of them provides the necessary support for a RICO claim. The claims relate solely to state-regulated credit life insurance.

## REASONS THE PETITION SHOULD BE DENIED

### I. There Is No Conflict Among the Circuits: Every Circuit Court That Has Addressed the Issue Has Held that Civil RICO Plaintiffs Must Plead and Prove Detrimental Reliance Upon the Alleged Mail or Wire Fraud in Order to Establish Proximate Causation between the RICO Violation and Their Injuries.

The Fifth Circuit's *Dixon* decision does not conflict with any decision of this Court or of any circuit court on the same matter. To the contrary, every circuit court that has addressed the issue has held that plaintiffs must show detrimental reliance in civil RICO actions predicated on mail or wire fraud.

Petitioners misread the circuits' holdings in an attempt to manufacture a conflict among the circuits. Petitioners erroneously claim that, in civil RICO cases based on mail or wire fraud predicate acts, the Fifth Circuit's "universal" reliance requirement to establish proximate cause conflicts with cases from the Second, Third, Fourth, Eighth, Ninth, Eleventh and District of Columbia Circuits, although Petitioners do properly

concede that the Sixth and Seventh Circuit opinions are consistent with those of the Fifth Circuit.[9] Petition at 9-10.

This Petition is the second recent attempt to claim that the Fifth Circuit's holdings on civil RICO reliance conflict with other circuits. On January 22, 2001, the Court properly denied certiorari on this precise issue in *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 896 (2001). The *Dixon* decision, in which the Fifth Circuit closely followed *Summit*, is an unpublished, per curiam decision without precedential value, and warrants a grant of certiorari even less than did *Summit*.

This Petition is simply a reworking of the *Summit* certiorari petition. The *Summit* petition railed against the Fifth Circuit's "blanket" reliance requirement; this phrase in the current Petition now appears as a harangue against a "universal" reliance requirement.[10] The Court should

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[9] *See Central Distribs., Inc. v. Connecticut*, 5 F.3d 181, 184 (6th Cir. 1993) (affirming the dismissal of civil RICO mail and wire fraud claims because plaintiff could not show reliance on any misrepresentations), *cert. denied*, 512 U.S. 1207 (1994); *Kenty v. Bank One*, 92 F.3d 384, 390-91 (6th Cir. 1996) (the court affirmed the dismissal of civil RICO claims predicated on mail fraud because the plaintiffs could not present evidence that they relied on misrepresentations); *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1254 (7th Cir. 1989) (affirming the dismissal of civil RICO claims predicated on mail or wire fraud because plaintiffs could not present evidence that they relied on misrepresentations by the defendants).

[10] *See* Petition at 9-10 n.16. A comparison of the petition from *Summit* with the Petition in this case shows that wholesale sections from the *Summit* petition are transferred verbatim to this petition or are slightly reworded and moved around.

deny this Petition, as it did in *Summit*, for, as demonstrated in Section B below, there is simply not any inter-circuit conflict on the civil RICO reliance issue.[11]

### A. As an Unpublished, Per Curiam Opinion with No Precedential Value, the Fifth Circuit's Decision in this Case Cannot Create a Conflict Among the Circuits.

The Fifth Circuit issued its decision in this case as an unpublished, per curiam opinion. App. at 2. Since 1996, unpublished opinions are not precedential in the Fifth Circuit, pursuant to Local Rule 47.5.4, which provides in pertinent part:

> Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like).

5th Cir. R. 47.5.4.

Obviously, an opinion that has no precedential value cannot create a conflict among the circuits. The Petition should be denied, because the Fifth Circuit's opinion has

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*Compare* "universal" test substituted for "blanket" test, *Summit* Petition at 9, 10, 11, 12, 14, 17, 22; *Dixon* Petition at 3, 6, 9, 11, 18, 22, 29.

[11] In fact, Respondents were not even able to find caselaw evidencing an *intra*-circuit conflict on the issue of requiring civil RICO plaintiffs to demonstrate their reliance on mail or wire fraud.

no impact on future decisions of any circuit, including the Fifth Circuit.

### B. There Is No Conflict Among the Circuits.

The Petitioners' assertion that the rulings of the Fifth Circuit on civil RICO detrimental reliance conflict with the holdings of the Second, Third, Fourth, Eighth, Ninth, Eleventh and District of Columbia Circuits simply cannot withstand scrutiny. No circuit conflict exists.

#### 1. The Second Circuit Requires Reliance.

The Second Circuit is fully consistent with the Fifth Circuit in requiring detrimental reliance in civil RICO actions predicated on mail or wire fraud to show proximate cause. In *Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2d Cir. 1992), *cert. denied*, 508 U.S. 952 (1993), the Second Circuit held that "[i]n the context of an alleged RICO predicate act of mail fraud, we have stated that to establish the required causal connection, the plaintiff was required to demonstrate that the defendant's misrepresentations were relied on." Petitioners neither cite nor distinguish *Metromedia*.

The cases cited by Petitioners do not support a conclusion that the Second Circuit and Fifth Circuit are in conflict on this issue. In *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256 (2d Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996), the Second Circuit addressed the enterprise requirement of RICO. The court did not hold that civil RICO plaintiffs need not plead reliance. In *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1299-1300

(2d Cir. 1990), ratepayers alleged that utility defendants had defrauded a public service commission. The court affirmed the dismissal of plaintiffs' claims on the basis that plaintiffs could not even show reliance by the public service commission. *Id.* at 1312. The court did not reach the issue of reliance by the plaintiff ratepayers. *Id.* at 1311-12. *Cement and Concrete Workers District Council Welfare Fund v. Lollo*, 148 F.3d 194 (2d Cir. 1998), is not a RICO case at all, but instead deals with ERISA and New York state law. Ironically, even this case, as off base as it is, requires reliance. *Id.* at 196 (because "the district court did not find that plaintiffs had proven their reliance on [defendant's] misrepresentations and because there is no evidence they did so rely, [defendant] is not liable under either ERISA or New York law.").

Petitioners' citation to *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs. L.P.*, 985 F.2d 102 (2d Cir. 1993), in support of their argument that a conflict exists between the Second and Fifth Circuits, is baffling. In *Standardbred*, the horseowners alleged in their affidavits that, "in the fraudulently induced belief that racing would continue, plaintiffs purchased, relocated and reconstructed capital equipment for use at the track, and designed their purchases and training of horses with the intent to race them at the track." *Id.* at 105. The Second Circuit reversed the dismissal of plaintiffs' RICO claims, because, "[i]f as plaintiffs contend, defendants continually misrepresented that they would not close the track and were not interested in developing the property, defendants fraudulently induced plaintiffs to take actions and make expenditures[.]" *Id.* This holding is completely consistent with the Fifth Circuit's decisions in this case and in *Summit*.

Two other cases cited by Petitioners also involve standing issues under RICO, and do not address reliance requirements at all. *See Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000); *Abraham v. Young & Rubicam, Inc.*, 79 F.3d 234 (2d Cir.), *cert. denied*, 519 U.S. 816 (1996).

**2. The Third Circuit Requires Reliance.**

The Third and Fifth Circuits are consistent in requiring detrimental reliance in civil RICO actions predicated on mail or wire fraud to show proximate cause. In *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 741 (3d Cir. 1996), the plaintiff filed suit against milk suppliers, alleging that the defendants engaged in a mail and wire fraud scheme to overcharge for dairy products in violation of civil RICO. The Third Circuit affirmed the dismissal of plaintiff's RICO claims for failure to plead and prove reliance. *Id.* at 746-47.

The cases cited by Petitioners do not support their argument that a conflict exists between the Third and Fifth Circuits. *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 918 (3d Cir. 1999), *cert. denied, mot. granted*, 528 U.S. 1105 (2000), is a putative class action by seven welfare funds against eight tobacco companies, seeking recovery for the funds' costs of treating their participants' smoking-related health costs. *Steamfitters* is not a detrimental reliance case. As expressly stated by the Third Circuit: "We need not focus on many of the necessary elements of these claims, such as the details of the conspiracy and the fraud, whether the Funds (or others) reasonably relied on the fraud, the

predicate acts for the RICO claims, etc. Rather, we focus on the issue of proximate cause . . . an element we find lacking in plaintiffs' case." *Id.* at 921.

The second case cited by Petitioners is even less on point. *Environmental Tectonics v. W.S. Kirkpatrick & Co., Inc.*, 847 F.2d 1052 (3d Cir. 1988), is inapplicable to a detrimental reliance requirement argument. *Environmental* involved commercial bribery, which does not require reliance, and for which a reliance requirement would make no sense. The Third Circuit did not consider in that case whether detrimental reliance is a proximate cause requirement in civil RICO claims predicated on mail fraud. *See id.*

### 3. The Fourth Circuit Requires Reliance.

The Fourth Circuit is consistent with the Fifth Circuit in requiring detrimental reliance in civil RICO actions predicated on mail or wire fraud to show proximate cause.

Inexplicably, Petitioners do not cite *Brandenburg v. Seidel*, 859 F.2d 1179, 1188-90 (4th Cir. 1988), in which the Fourth Circuit held that civil RICO plaintiffs whose claims are predicated on mail or wire fraud must plead that they detrimentally relied on fraudulent statements, and that the statements were the proximate cause of their injury.

The Fourth Circuit consistently has followed *Brandenburg*. Petitioners cite *Chisholm v. Transouth Finan. Corp.*, 95 F.3d 331, 339 (4th Cir. 1996), for a cryptic reference to "systemic reliance on legality of process." Petition at 9

n.16. In *Chisholm*, however, the Fourth Circuit specifically remanded on the basis that the plaintiffs were entitled to amend their complaint to allege reliance. *Id.* at 338. On review of the subsequent dismissal of the amended complaint, the Fourth Circuit reversed and remanded, holding that "the third amended complaint sufficiently pleads reliance." *Chisholm v. Transouth Finan. Corp.*, No. 97-1970, 1998 WL 709311 at *2 (4th Cir. Oct. 5, 1998).

The other Fourth Circuit cases cited by petitioners also fail to support an argument that there is a conflict with the decision of the Fifth Circuit's *Dixon* decision. *Mid-Atlantic Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 264 (4th Cir. 1994) (citing *Brandenburg*, the court remanded the case for resolution of the reliance issue), *cert. denied*, 513 U.S. 931 (1994); *John C. Holland Enterprises, Inc. v. J.P. Mascaro & Sons, Inc.*, 653 F.Supp. 1242, 1249 (E.D. Va.), *aff'd*, 829 F.2d 1120 (4th Cir. 1987) (addressing whether the plaintiff had properly pled the elements of the predicate acts of a RICO claim).

**4. The Eighth Circuit Requires Reliance.**

The Eighth Circuit is consistent with the Fifth Circuit in requiring detrimental reliance in civil RICO actions predicated on mail or wire fraud to show proximate cause.

In *Appletree Square I, Ltd. Partnership v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994), the owner of a building filed RICO claims against the manufacturer of

fireproofing materials, but did not allege "any misstatements or misrepresentations" or that "it relied on any misrepresentations in purchasing the building." The Eighth Circuit agreed with the district court that the plaintiff lacked standing, because it failed to show "it detrimentally relied on any of the alleged misrepresentations in its purchase of the building[.]" *Id.* at 1287.

Petitioners do not even try to distinguish *Appletree.* Instead, they cite to Eighth Circuit cases which are not on point. *Atlas Pile Driving Co. v. DiCon Finan. Co.*, 886 F.2d 986, 990-93 (8th Cir. 1989), focused on the statutory requirements for mail and wire fraud as predicate acts. As stated in *Summit,* however, the issue of the statutory requirements for mail or wire fraud is "distinct" from proximate cause requirements for civil RICO plaintiffs. *Summit,* 214 F.3d at 559.

Similarly, Petitioners' reliance on *United HealthCare Corp. v. American Trade Ins. Co.*, 88 F.3d 563 (8th Cir. 1996), is less than apt. In *United HealthCare,* the Eighth Circuit addressed whether detrimental reliance is a statutory requirement of *criminal* mail or wire fraud, not whether reliance is necessary to prove proximate cause in a *civil* RICO case. Petitioners' citation to *Bieter Co. v. Blomquist,* 987 F.2d 1319, 1325-27 (8th Cir.), *cert. denied,* 510 U.S. 823 (1993), is equally misplaced. *Bieter* is a bribery case; thus, the court neither mentioned nor considered detrimental reliance as a requirement to show proximate cause. Petitioners' citation to *Newton v. Tyson Foods, Inc.*, 207 F.3d 444 (8th Cir. 2000), does not support a conflict argument, because it neither mentioned nor addressed reliance. Instead, the *Newton* court held that the plaintiffs lacked

standing because their injury was too "attenuated" and remote. *Id.* at 447.

### 5. The Ninth Circuit Requires Reliance.

The Ninth Circuit is consistent with the Fifth Circuit in requiring detrimental reliance in civil RICO actions predicated on mail or wire fraud to show proximate cause.

Petitioners cite *Oregon Laborers-Employers Health and Welfare Fund v. Philip Morris, Inc.*, 185 F.3d 957, 961 (9th Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000), but as the case name implies, this is another case in which welfare funds sued tobacco companies (this time six welfare plans sued eight tobacco companies). The Ninth Circuit merely concluded that the welfare funds could not recover for harm suffered by the plans' participants because "the 'remoteness' test weighs in favor of barring plaintiffs' action[.]" *Id.* at 984.

Petitioners fail to cite or distinguish or analyze *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997), *aff'd*, 525 U.S. 299 (1999), a case directly on point. In *Forsyth*, the Ninth Circuit expressly stated that, to maintain a civil RICO claim based on mail or wire fraud, plaintiffs must "establish that they relied on misrepresentations . . . and that these misrepresentations directly caused them a concrete financial loss." *Id.* at 1481. Further, Petitioners ignore *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504-05 (9th Cir. 1986) (plaintiff's mail fraud allegations were "without foundation" because it could not present evidence of reliance).

### 6. The Eleventh Circuit Requires Reliance.

The Eleventh Circuit is fully consistent with the Fifth Circuit in requiring detrimental reliance in civil RICO actions predicated on mail fraud to show proximate cause. Petitioners' argument that the Eleventh Circuit is in conflict with the Fifth is disingenuous, at best.

Petitioners grudgingly concede that the Eleventh Circuit has required reliance in civil RICO cases alleging mail or wire fraud. In *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998), the Eleventh Circuit denied plaintiff's civil RICO claims because the alleged misrepresentations were made to third parties, not plaintiff, and therefore reliance was lacking. The Eleventh Circuit held that "when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme." *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-500 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991). Petition at 10 n.16.

Petitioners mistakenly cite *All Care Nursing Serv. v. High Tech Staffing*, 135 F.3d 740 (11th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999), in support of their argument that the Eleventh Circuit is in conflict with the Fifth Circuit, but the case clearly stands for the opposite proposition. In *All Care*, the court stated that reliance must be shown by a plaintiff to prove "he was injured by reason of the RICO defendant's deception and fraud." *Id.* at 745 n.10 (citing *Pelletier*).

Petitioners cite to *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1398-1403 (11th Cir. 1994), another bribery case that did not, and did not need to, address "reliance" as a proximate cause requirement. It is notable, however, that *Cox* cited to *Pelletier* with approval. *Cox*, 17 F.3d at 1396.

Petitioners' citation to *Taffet v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991), 967 F.2d 1483 (en banc) (11th Cir.), *cert. denied*, 506 U.S. 1021 (1992), is equally unavailing. As in *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1299-1300 (2d Cir. 1990), analyzed above, *Taffet* involved ratepayers' claims that the defendants defrauded public utility commissions into agreeing to higher rates, harming the consumers. *Taffet*, 930 F.2d at 856. The court never addressed the reliance requirement; on reconsideration, the Eleventh Circuit rendered its decision under an application of the "filed rate doctrine," clearly irrelevant to Petitioners' conflict argument. *Taffet*, 967 F.2d at 1494.

### 7. The District of Columbia is Not in Conflict with the Fifth Circuit.

The District of Columbia has not addressed the issue whether detrimental reliance is required in civil RICO actions predicated on mail or wire fraud to show proximate cause. The case cited by petitioners, *BCCI Holdings (Luxembourg), S.A. v. Khalil*, 214 F.3d 168 (D.C. 2000), involved the RICO direct injury requirement, not whether a showing of reliance is required by civil RICO plaintiffs. There is, therefore, no conflict between the decision of the Fifth Circuit and the District of Columbia.

## II. Petitioners' Argument Concerning the Fifth Circuit's "Ordinary Prudence Standard for Scheme to Defraud" Does Not Present a Meaningful Conflict Among Circuit Courts.

The district court's judgment dismissing Petitioner's RICO claims, and the Fifth Circuit's judgment affirming dismissal, focus on a single, straight-forward issue: were Petitioners obligated to allege reliance on Defendants' purported mail or wire fraud in order to state a civil RICO claim based on predicate acts of mail or wire fraud? Rather than focus on this simple issue, Petitioners apparently argue in Section A of their Petition either that no prudence should be required of any plaintiff to find an actionable "scheme to defraud," or that the plaintiff's prudence should be subjectively evaluated. This Court should deny certiorari on this issue for two reasons: (1) the Fifth Circuit's purported "ordinary prudence standard for scheme to defraud" was not raised below; and (2) the Fifth Circuit's so-called "objective standard" for evaluating a plaintiff's prudence is irrelevant to the outcome of this case.

### A. Petitioners' Argument Concerning the "Ordinary Prudence Standard for Scheme to Defraud" Was Not Raised Below.

On July 21, 2000, the district court ordered all parties to brief the issue of whether subject matter jurisdiction existed for Petitioners' suit. App. at 19. The sole substantive legal issue concerning RICO addressed by the district court was whether these plaintiffs must plead reliance in order to state a civil RICO claim based on mail fraud. App. at 4, 24, 28, 31. In dismissing Petitioners' RICO

claims, the district court held the Petitioners failed to state a claim under RICO because they conceded that they did not rely on Defendants' alleged misrepresentations or omissions. App. at 31 (quoted at 2 above).

The district court's dismissal of Petitioners' RICO claims was confined to this narrow, uncomplicated issue. On appeal, the Fifth Circuit limited its analysis to the sole issue of whether Petitioners must have alleged reliance to establish a civil RICO claim based on mail fraud predicate acts. App. at 4, 5, 7.

Neither the district court nor the Fifth Circuit made any mention of the Fifth Circuit's supposed "ordinary prudence standard for proving a scheme to defraud," or how this "objective standard" applied in this case. Further, the briefs submitted by the parties do not reference such a so-called "objective standard" for determining a plaintiff's "ordinary prudence" in a scheme to defraud.

It is well-established that this Court generally does not consider issues raised for the first time in a petition for certiorari.[12] *See Glover v. United States*, 531 U.S. 198,

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[12] Petitioners also advance, for the first time in their petition, a puzzling argument that the "Fifth Circuit's requirement of inducement by the perpetrator and detrimental reliance by the victim ([so-called] 'convergence')" is in conflict with the First Circuit. Petition at 9-11. The cases cited by Petitioners are criminal RICO cases dealing with a requirement that the victim who suffered the loss must have been the intended target of the perpetrator. *Id.* at 11 n.18. There are no facts in this case to which a "convergence" theory is applicable. In any event, the Petitioners' "convergence" theory was never raised below, was never mentioned by the courts below, and is irrelevant to the narrow issues before the Court.

205 (2001) ("We need not describe the arguments in great detail, because . . . they were neither raised in nor passed upon by the Court of Appeals. In the ordinary course we do not decide questions neither raised nor resolved below."). *See also United States v. Ortiz*, 422 U.S. 891, 898 (1975) (argument raised for first time in petition for certiorari not considered); *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."); *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977) ("Not having been raised in the District Court, that issue is not before us."). Accordingly, certiorari should be denied on Petitioners' newly created attempt to raise an issue not even briefed, much less discussed, below.

### B. Petitioners' Argument Concerning the Fifth Circuit's "Ordinary Prudence Standard for Scheme to Defraud" Is Irrelevant.

Petitioners' argument is also completely irrelevant to determining whether the Fifth Circuit correctly affirmed the district court's dismissal of the civil RICO claims. The district court dismissed Petitioners' civil RICO claims simply because they failed to plead or prove reliance on the alleged mail or wire fraud, and the Fifth Circuit affirmed on this basis. *See* App. at 4, 5, 7, 24, 28-31. Even if this Court were to resolve an alleged "conflict" in the circuits concerning whether an "objective standard" should be applied to evaluate a plaintiff's "ordinary prudence" in a "scheme to defraud," this would do nothing to alter the result reached by the courts below, and would avail the Petitioners nothing.

### 1. The "Ordinary Prudence Standard for Scheme to Defraud" Was Not Mentioned by the Lower Courts in this Case.

Petitioners argue that the Fifth Circuit has improperly formulated the "objective standard" for evaluating a "scheme to defraud" by requiring that such a scheme be calculated to deceive a person of "ordinary prudence." Petition at 7-8. Notably, Petitioners do not claim the Fifth Circuit misstated, or even referred to, the "ordinary prudence standard for scheme to defraud" in *this* case.

Rather, Petitioners cite solely to *Silverman v. United States*, 213 F.2d 405, 407 (5th Cir. 1954), *cert. denied*, 348 U.S. 828 (1954), a case decided nearly half a century ago, and long before RICO was even a glimmer in the eye of Congress. *See* Petition at 3, 7 n.11, 16. Petitioners then cite cases from other circuits that allegedly formulate a standard different from the Fifth Circuit's 1954 *Silverman* decision. Petition at 8. Petitioners assert that the other circuits reject the Fifth Circuit's "ordinary prudence," or "objective standard," and hold that it is sufficient if a defendant's "scheme to defraud" was calculated to deceive a "gullible" or "dull" person. *See* Petition at 8 n.13.[13] Irrespective of whether there is an actual conflict

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[13] Petitioners cite several cases in support of their argument that there is an intercircuit conflict regarding the "ordinary prudence standard for scheme to defraud," none of which are relevant here. *See* Petition at 8 n.12, 13. The "conflict" established by these cases is illusory. Indeed, of all of those cited cases, only two even rate a mention by Petitioners in subsequent footnotes of their Petition. *See United States v. Biesiadecki*, 933 F.2d 539 (7th Cir. 1991), Petition at 17 n.36, and *United States v. Coffman*, 94 F.3d 330 (7th Cir. 1996), *cert. denied*, 520 U.S. 1165

between other circuits and the 1954 *Silverman* case concerning an "objective" versus "subjective" versus "non-existent" standard to measure a plaintiff's prudence in a "scheme to defraud," this issue played no part in the lower court's decision.

**2. More Is Required for Civil RICO Liability.**

The lower courts correctly separated the issue of whether a mail fraud scheme could have existed here from the issue of whether more is required to entitle Petitioners to *civil damages* under RICO:

> [T]he fact remains that mail fraud schemes (and for that matter, all manner of crimes) can be occurring around us everyday, and while their mere existence provides the Government a right to prosecute the perpetrators, it does not provide a private civil cause of action for an individual plaintiff until the fraud has actually injured him or her. For this reason, reliance is necessary to establish proximate cause in a civil RICO action based on mail fraud.

App. at 28.

The above excerpt from the district court's opinion demonstrates that Petitioners' allegations about an

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(1997), Petition at 18 n.37. Interestingly, the majority of the cases cited by Petitioners are irrelevant criminal cases, and only one of those even involved criminal RICO claims (*Biesiadecki*). Criminal cases are completely irrelevant to the resolution of this case, as the lower courts' sole ground for dismissing Petitioners' civil RICO claims was that Petitioners failed to demonstrate that Defendants proximately caused Petitioners' alleged *civil* RICO damages. *See* App. at 4, 5, 7, 31.

alleged mail fraud scheme are actually irrelevant to the limited issues before this Court. The district court ruled, and the Fifth Circuit affirmed, that *even if* defendants participated in a scheme to defraud, Petitioners' claims are still deficient, because they have failed to allege a civil RICO injury proximately caused by their "reliance on the predicate mail fraud." App. at 9.

*Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), *cert. denied*, 502 U.S. 855 (1991), a case cited in Petitioners' brief (from a circuit the Petitioners erroneously contend is in conflict with the Fifth Circuit), reinforces the distinction made by the district court in this case and highlights the irrelevance of Petitioners' argument. In *Pelletier*, the plaintiff alleged that the defendant violated RICO through the predicate acts of mail and wire fraud. *Id.* at 1498. The Eleventh Circuit then distinguished between the showing necessary to demonstrate a violation of the federal mail and wire fraud statutes and the further showing needed to establish civil RICO liability:

> When a private plaintiff relies on a violation of the mail or wire fraud statutes as a predicate act for civil RICO, he faces an additional hurdle before he can obtain recovery: He must show not only that the mail and wire fraud statutes have been violated, but also that he has suffered injury as a result of the violation. . . . Section 1964(c), as interpreted by the Supreme Court and lower courts, thus imposes a proximate cause requirement: the plaintiff's injury must have been proximately caused by the commission of the predicate acts. . . .
>
> This means that, when the alleged predicate act is mail or wire fraud, the plaintiff must have

> been a target of the scheme to defraud *and must have relied to his detriment on misrepresentations made in furtherance of that scheme.*

*Id.* at 1499-1500 (citations omitted) (emphasis added).

In this case, the district court and the Fifth Circuit, just like the Eleventh Circuit in *Pelletier*, held that even if Petitioners' pleadings adequately set forth the commission of a predicate act by defendants through their participation in a mail fraud scheme to defraud Petitioners, Petitioners did not state a civil RICO claim, because they failed to allege they were injured as a proximate result of this alleged scheme – *i.e.*, that they relied on the defendants' alleged misrepresentations or omissions. App. at 4, 5, 7, 9, 24, 28-31.[14]

The district court and the Fifth Circuit held that a plaintiff must overcome two hurdles in order to state a claim under civil RICO based on mail fraud predicate acts: (1) the plaintiff must show the defendant committed mail fraud; and (2) the plaintiff must show that his reliance on this predicate act proximately caused his damages. The district court and the Fifth Circuit found that Petitioners did not satisfy the second hurdle, because they admitted "that they did not detrimentally rely on any misrepresentations or omissions in defendants' mail fraud." App. at 4, 5, 7, 24, 28-31.

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[14] The Eleventh Circuit held, as did the lower courts in this case, that "even if [the defendant] did participate [in a scheme to defraud] as alleged, a jury could not find that [the plaintiff] was injured by reason of an act committed in furtherance of that scheme." *Id.* at 1500.

Thus, the alleged inter-circuit conflict regarding the correctness of applying an "objective standard" to evaluate a plaintiff's prudence for finding a scheme to defraud is irrelevant, as resolution of that "conflict" affords Petitioners nothing. Petitioners can only succeed if they successfully attack the judgments of the district court and the Fifth Circuit with respect to the second hurdle; whether they relied on the mail fraud predicate acts. Accordingly, certiorari should be denied on this issue.

### 3. The Distinction between an Objective Standard and Other Standards is Irrelevant.

Petitioners' argument is irrelevant for another reason. Petitioners argue that the Fifth Circuit's "ordinary prudence standard for a scheme to defraud" is erroneous, because a scheme to defraud exists even if a defendant's misrepresentations/omissions are only calculated to deceive a "gullible" or "dull" person. *See* Petition at 7-8. Petitioners attack the Fifth Circuit's purported "objective standard." While Petitioners' arguments are muddled, they seem to make two arguments. The first appears to be that an objective evaluation of a plaintiff's prudence/reliance is not required, because no reliance is needed to state a claim. This, of course, is the substance of Petitioners' second argument in support of their Petition for Certiorari here, as in the *Summit* petition, and is addressed in the prior section of this opposition.

Petitioners' second argument may be that a plaintiff's prudence, or reliance, should not be judged objectively, but rather subjectively, so as to include dull or gullible

plaintiffs who subjectively relied on a defendant's misrepresentation. This argument is also unavailing, because there was no reliance at all by Petitioners in this case. Consequently, there was no reliance to judge, by either an objective or subjective standard. The subjective gullibility, or objective prudence, of an alleged civil RICO victim could only be relevant if that victim actually relied on a defendant's mail or wire fraud, because a defendant would argue that plaintiff's subjective (gullible) reliance was unreasonable.

Here, by contrast, Petitioners have not alleged any reliance, either subjective or objective. Petitioners have admitted that they did not rely on any mail or wire fraud, and the rulings below were based on this admission. *See* App. at 4, 5, 7, 24, 28-31. In fact, Petitioners' primary argument in this case, as advanced in the courts below, is that reliance is not necessary to support a civil RICO claim. As stated above, the circuit courts uniformly require reliance to show proximate cause in a civil RICO claim based on mail or wire fraud. Accordingly, whether an intended RICO victim's prudence must be judged by an objective standard or a subjective standard is irrelevant to the issues involved in this case.

If the resolution of a conflict is irrelevant to the ultimate outcome of a case before this Court, certiorari should be denied. Robert L. Stern, et al., *Supreme Court Practice*, § 4.4, at 173 (7th ed. 1993) (citing *Sommerville v. United States*, 376 U.S. 909 (1964)). This Court has often denied certiorari when an apparent conflict is not relevant to the outcome of a case. For example, in *River Road Alliance v. Corps of Eng'rs of the United States*, 475 U.S. 1055 (1986), the Supreme Court denied certiorari, even though,

as pointed out in the Seventh Circuit's opinion below, there was a circuit split concerning the standard of review of a federal agency's decision not to prepare an environmental impact statement. *River Rd. Alliance v. Corps of Engineers of the United States*, 764 F.2d 445, 449 (7th Cir. 1985), *cert. denied*, 475 U.S. 1055 (1986). As Justice White noted in an earlier dissent from denial of certiorari, there was a clear conflict between the circuits on this issue. *See Gee v. Boyd*, 471 U.S. 1058 (1985). In *River Road Alliance*, however, the conflict was not relevant to the petitioner because, as the Seventh Circuit observed, it would lose regardless of the standard applied. *River Rd. Alliance*, 764 F.2d at 449. Certiorari should similarly be denied in this case, because Petitioners would also lose regardless of whether an objective or subjective "prudence" standard applies.

*Greber v. United States*, 474 U.S. 988 (1985), is another case where a circuit court conflict was not relevant to a petitioner's case. The question that petitioner wanted the Court to resolve was whether the issue of materiality, in prosecutions for making false statements in a matter within the jurisdiction of a department or agency of the United States, should be submitted to the jury or decided by the judge. A majority of the circuits, including the Third, where the case originated, believed the issue should be decided by the judge rather than the jury. *See Greber v. United States*, 760 F.2d 68, 72 (3d Cir. 1985), *cert. denied*, 474 U.S. 988 (1985). The Ninth Circuit had stated that the issue should be decided by the jury. *See United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979). However, the Ninth Circuit had also stated that failure to submit the issue to the jury was not reversible error. *Id.* The

petitioner thus had no chance for reversal under the Ninth Circuit standard and would have lost in all of the other circuits. Certiorari was properly denied, as the resolution of the inter-circuit dispute presented did not affect the outcome of the case.

In this case, even assuming, *arguendo*, that Petitioners have correctly identified a circuit split on whether the "objective standard" for judging a plaintiff's "prudence for scheme to defraud," resolution of such an inter-circuit dispute would not affect the outcome of this case. Plaintiffs still failed to plead or prove reliance in support of their civil RICO claims based on mail or wire fraud. Petitioners' alleged circuit split is nothing more than a red herring, and their Petition should be denied.

## III. Certiorari Should Be Denied in this Case Because It Was Correctly Decided and Does Not Warrant the Court's Review.

Petitioners' opinion that reliance is not necessary to prove proximate cause cannot override the circuits' jurisprudence which has consistently and repeatedly held otherwise. For more than ten pages of their pleading, Petitioners make the same broad policy arguments as urged in the *Summit* petition in favor of a more expansive reading of RICO, unfettered by any supporting circuit court authority. The fact remains, however, that the unpublished – per curiam decision rendered in this case followed the jurisprudence established in the Fifth Circuit and every other circuit which has addressed the issue.

This decision below turns on its own facts, and it will affect few others than these litigants. The *Dixon* court

decided this case correctly, relying on *Summit*, which the Court has declined to review. Moreover, Petitioners' claims fall squarely within the province of Louisiana state law and should, therefore, be resolved by Louisiana courts.

## CONCLUSION

Every circuit court to address the issue, including the Fifth Circuit, has consistently held that civil RICO plaintiffs must plead and prove detrimental reliance upon the alleged mail or wire fraud in order to establish proximate causation between a RICO violation and injury. There is, therefore, no conflict among the circuits on this issue. Petitioners' "ordinary prudence standard" is not properly before this Court, because it was not raised below, it is just another version of the reliance issue, and it is

irrelevant to the outcome of this case. For these reasons and because the Fifth Circuit correctly decided this case, certiorari should be denied.

Respectfully submitted,

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